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No. 99 370

In The
Supreme Court of the United States

JOHNNIE LEE EVANS
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Peition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Supreme Court of Illinois erroneously applied the *Strickland* standard in affirming dismissal of petitioner's claim of ineffective assistance based on defense counsel's failure to investigate and introduce at his death penalty sentencing hearing available evidence that he was under the influence of an extreme emotional or mental disturbance at the time of the offense.

2. Whether the Supreme Court of Illinois erroneously applied the *Strickland* standard in affirming dismissal of petitioner's claim of ineffective assistance based on defense counsel's failure to investigate and introduce at his death penalty sentencing hearing other available mitigating evidence.

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CITATIONS OF OPINIONS AND ORDERS

The opinion of the Supreme Court of Illinois affirming dismissal of petitioner's petition for post-conviction relief, 186 Ill. 2d 83, 708 N.E.2d 1158, is set forth in the Appendix at 1. The order of the Supreme Court of Illinois denying petitioner's timely petition for rehearing is unreported and set forth in the Appendix at 29. The order of the Circuit Court of Cook County dismissing petitioner's petition for post-conviction relief is unreported and set forth in the Appendix at 20.

BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Illinois entered its judgment on February 19, 1999. The Supreme Court of Illinois denied petitioner's timely petition for rehearing on March 29, 1999. On June 11, 1999, Justice Stevens of this Court granted petitioner's application for extension of time within which to file a petition for writ of certiorari to and including August 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Rule 29.4(b) or (c) of this Court does not apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

> have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Illinois death penalty statute, 720 ILCS 5/9-1, provides, in pertinent part:

> The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. . . . Mitigating factors may include but need not be limited to the following:
>
> . . .
>
> (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution . . .

STATEMENT OF THE CASE

This case involves important constitutional issues under the Sixth Amendment to the Constitution of the United States, as interpreted by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court of Illinois held that petitioner failed to allege a violation of his Sixth Amendment right to effective assistance of counsel at his death penalty sentencing hearing. In so holding, the Supreme Court of Illinois analyzed the merits of petitioner's claims under a standard that is inconsistent with decisions of this Court and other federal courts under *Strickland* and its progeny. This Court should grant a writ of certiorari to rectify this error of the Supreme Court of Illinois.

A. Mr. Evans' Trial

Petitioner, Johnnie Lee Evans, was charged by indictment with the offenses of murder and attempted rape of Adrian Allen on January 22, 1983. (TCR at 3135-3141.) On May 2, 1984, at the conclusion of a jury trial, Mr. Evans was convicted of murder and attempted rape. (TR at 2457, TCR at 3550-3351.) Mr. Evans then waived his right to be sentenced by a jury. (TR at 2461-2463, TCR at 3321.)

Defense counsel asked for a continuance of 30 days so that Mr. Evans could be examined by Dr. Alan K. Rosenwald, a self-employed clinical psychologist, whom trial counsel "expect[ed] . . . to testify in the mitigation phase as a doctor of psychology." (TR at 2464.) The following day, trial counsel presented a written motion for a continuance so that Mr. Evans could be examined by psychological and possibly psychiatric personnel. (TCR at 3352, TR at 2470-2473.) At a hearing on the motion, the court inquired as to the purpose of the examination. (TR at 2471.) Trial counsel responded: "[j]udge, it would go to the indicia -- miti-

gation. I believe one of the factors in mitigation is that extreme mental, emotional distress." *Id.* The court granted the motion for a continuance "because of the severity of the case." (TR at 2472.)

At the penalty phase of Mr. Evans' sentencing hearing, defense counsel presented two witnesses: Mr. Evans testified on his own behalf, and Dr. Rosenwald testified on behalf of Mr. Evans. (TR at 2816-2965, 2966-2970.) Mr. Evans described his upbringing, limited education, attempts to find employment, his marriage and the loss of his children. Mr. Evans asked the court to spare his life. (TR at 2904.) He said that he was sorry for the crimes that he had committed. (TR at 2919.)

Dr. Rosenwald testified that, at the request of defense counsel, he examined Mr. Evans for approximately three hours, during which time he administered the Rorschach ink blot test, the Vanlennep 4-picture test, and a projective sentence completion test. (TR at 2970-2973.) Dr. Rosenwald spent an additional six to eight hours scoring the tests and interpreting the results. (TR at 2974, 3000-3001.) Dr. Rosenwald testified that Mr. Evans suffers from "a kind of psychopathology in the sexual area." (TR at 2992.)

Defense counsel asked Dr. Rosenwald whether he was "able to a degree of reasonable certainty, able to determine whether or not Mr. Evans is acting under an extreme emotional or mental distress." (TR at 2993.)[1] Dr. Rosenwald replied:

---

[1] The incongruities between counsel's question and the pertinent statutory language manifest the lack of preparation that went into Dr. Rosenwald's examination. Specifically, counsel did not ask Dr. Rosenwald whether Mr.

> Well, if extreme is chronic, I have trouble with the term extreme. I think this is a long-standing mental disturbance, and that consequently there would be periods of time where he would be acting under extreme duress. That he has been chronically ill for many years.

Id.

On cross-examination, Dr. Rosenwald admitted that he had not been asked to evaluate whether Mr. Evans was acting under the influence of mental or emotional disturbances at the time of the Allen murder:

> Q. Doctor, this is my last question. *Were you ever asked to consider whether or not the defendant at the time that he committed a murder was under the influence of an extreme emotional or mental disturbance?* Were you ever asked to consider that particular point?
>
> A. *Today*, yes.
>
> Q. You were?
>
> A. Yes.
>
> Q. Well, you don't have any conclusion as to that in your report, do you?

Evans "*was* acting under the influence of extreme mental or emotional *disturbance at the time of the offense*." 720 ILCS 5/9-1(c)(2) (emphasis added). Rather, counsel asked Dr. Rosenwald whether Mr. Evans "*is* acting under an extreme emotional or mental *distress*." (TR at 2993) (emphasis added).

A. No.

Q. But you were asked to actually consider that?

A. *I was not asked to include that in my report.*

Q. Oh, you were not asked to include that in your report, *but you were initially asked to make that determination, weren't you?*

A. *I don't believe that.* I believe if I recall correctly that was true in most psychological cases that *I was asked to evaluate personality characteristics of Mr. Evans.*

* * *

Q. Have you ever testified at a death penalty hearing before today?

A. Yes.

Q. Were you ever shown the criminal statutes regarding mitigation?

A. Yes.

Q. And you are aware, are you not, Doctor, that one factor in mitigation set out in the statute is whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance?

A. Yes.

Q. And in addition to that, although not such as to con itute a defense to prosecution, you are familiar with that paragraph, aren't you?

A. Yes.

Q. And, Doctor, *weren't you told that that was the purpose of your examination in the first place?*

A. *I was told that the purpose of my examination was the death penalty was being considered. I was not told specifically to look for what particular circumstances might underlie that.*

Q. You understand today, though, that you are testifying as a death penalty hearing, correct?

A. I understand that.

Q. And you do not have any opinion at this time, number one, when the defendant committed a murder he was under any influence of extreme mental or emotional --

A. I believe, counsel, that referring back to the comments I made earlier, I indicated that it was highly probable that Mr. Evans was under emotional factors which could contribute to the crimes that he committed. *That I questioned that I wasn't clear in my own mind what is meant by extreme.*

(TR at 3029-3031) (emphasis added).

At the close of the sentencing hearing, the trial court found that Mr. Evans was not acting under the influence of an extreme mental or emotional disturbance at the time of the offense and there were no mitigating circumstances or factors sufficient to preclude the imposition of the death sentence. (TR at 3101-3102.) Accordingly, the court sentenced Mr. Evans to death. (TR at 3102, 3408.)

B. Mr. Evans' Direct Appeal to the Supreme Court of Illinois

On direct appeal to the Supreme Court of Illinois, Mr. Evans argued, among other things, that the trial court improperly rejected evidence of extreme mental or emotional disturbance as a mitigating factor precluding the death penalty. *People v. Evans*, 125 Ill. 2d 50, 86, 530 N.E.2d 1360, 1375 (1988). The Supreme Court of Illinois held that the trial court did consider Mr. Evans' "alleged mitigating evidence," but that the trial court "specifically found that the murder of Adrian Allen was not committed while defendant was acting under extreme or emotional disturbance." *Id.* at 88, 530 N.E.2d at 1376. The Supreme Court of Illinois refused to disturb the trial court's finding on this point, noting:

> Significantly, nowhere in his testimony does Dr. Rosenwald specifically state that defendant operated under extreme mental or emotional disturbance at the time he committed the offense. At most, he testified that defendant "was under emotional factors which *could* contribute to the crimes."

Id. (emphasis added.)

The Supreme Court of Illinois also distinguished cases in which the trier of fact failed to consider uncontradicted evidence pertaining to a mitigating circumstance, noting that Mr. Evans had presented *no* evidence that he acted under the influence of an extreme mental or emotional disturbance at the time of the offense:

> Here, however, defendant simply failed to establish the *existence* of the mitigating factor by *any* evidence - uncontradicted or otherwise. He presented no testimony whatever that he

> operated under an *extreme* mental or emotional disturbance *at the time of the offense*, as required by the statute.

Id. at 89, 530 N.E.2d at 1377 (emphasis in original). Thus, the Supreme Court of Illinois affirmed Mr. Evans' convictions and sentences. *Id.* at 99, 530 N.E.2d at 1382. This Court denied Mr. Evans' petition for a writ of certiorari. *Evans v. Illinois*, 490 U.S. 1113 (1989).

C. Mr. Evans' Petition for Post-Conviction Relief

Mr. Evans filed his petition for post-conviction relief on June 27, 1990. (CR at C-11) In his amended petition, Mr. Evans alleged five violations of his constitutional rights at the original trial and sentencing hearing. Among other things, Mr. Evans alleged that he was denied the effective assistance of counsel at the penalty phase of the sentencing hearing based on his counsel's failure to: (1) investigate and present evidence that he was acting under the influence of an extreme mental or emotional disturbance at the time of the murder; and (2) investigate and present other mitigating evidence.

Mr. Evans' claims were supported by affidavits and other documents which contained significant new evidence, not produced at the original trial. Much of this was mitigating evidence which was not presented during the penalty phase of the sentencing proceeding. In particular, Arlene Messner-Peters, a licensed clinical social worker, for the first time presented a thorough social history of Mr. Evans. To prepare this social history, Ms. Messner-Peters obtained documents reflecting Mr. Evans' medical, educational, employment and family background. Appendix ("App.") at 32-34. Ms. Messner-Peters also interviewed Mr. Evans, two of his sisters, his wife and his wife's sister and re-

viewed written summaries of interviews of Mr. Evans' cousin and a former school teacher. App. at 32. The social history prepared by Ms. Messner-Peters included the following:

Mr. Evans was born on February 23, 1951 in Delaware, the fourth of eight children born to Ethel Mae Evans. App. at 34. Mr. Evans never met, or knew the identity of, his biological father. He was told that he was conceived when his father raped his mother. Shortly after his birth, Mr. Evans' mother gave him away. *Id.*

As a young child, Mr. Evans was raised by his great-aunt, Annie Kelly. Ms. Kelly, a migrant farm worker, was a violent and aggressive person. She physically abused him. App. at 35-36. Mr. Evans also lived from time to time with Ms. Kelly's daughter and her family. Life in this household was chaotic and chaotic. The children engaged in inappropriate sexual conduct. Mr. Evans was frequently reminded that he was not wanted, that he ate too much or was too much of a burden. App. at 36-37.

At age 14, Mr. Evans was sent to live with his mother and her other children in a housing project in Chicago. Incest and inappropriate sexual behavior were common in this household as well. App. at 39. Around age 15, Mr. Evans began to abuse alcohol as a way to escape from his environment and from himself. He drank to intoxication every day. Around age 18, he began using drugs heavily. App. at 39, 44.

Mr. Evans' education was intermittent. He dropped out of school after eighth grade. App. at 41.

From infancy, Mr. Evans had a congenital cataract in his left eye. At age 10, his eye was removed. App. at 38-39. Mr. Evans' visual disability, slight stature, limited education and emotional and psychological problems made

it difficult to him to find work. Nevertheless, as a young man, he made efforts to find employment. App. at 41-42.

In approximately 1970, Mr. Evans moved in with Betty Ann Clanton Pruitt, a young woman with a history of mental illness. Their son, Johnnie Lee, was born in 1971; a second son was born two years later. In 1974, while Mr. Evans was in jail on charges which were later dropped, the children were removed from the home because of abuse or neglect. App. at 43-44.

Following his release from prison, Mr. Evans' life continued to deteriorate. On the day of the Allen murder, he was again living with his mother, where he was not wanted. He was hungry, intoxicated, and had smoked marijuana and had used PCP. App. at 44.

Ms. Messner-Peters concluded that the chronic physical, sexual and emotional abuse Mr. Evans suffered had lifelong effects on his emotional and social development, including the association of love with violence and the inability to function under stress without aggression. And, as a result of the chronic sexually abusive and inappropriate behavior to which Mr. Evans was exposed from childhood on, Mr. Evans suffers from extremely low self-esteem and the inability to establish appropriate sexual boundaries with people with whom he interacts. App. at 45.

Ms. Messner-Peters further concluded that Mr. Evans entered adolescence and adulthood without the educational and social skills necessary to function successfully in society. The absence of these skills was exacerbated by the physical disability of his blindness in his left eye. As a result of Mr. Evans' chronic drug and alcohol abuse and his lack of education, Mr. Evans was unable to find suitable employment. Mr. Evans' social history presented him with

overwhelming obstacles for which he received inadequate assistance throughout his life. The combination of Mr. Evans' drug and alcohol addiction and his entry into adulthood with extremely limited abilities made his contacts with the criminal justice systems almost an inevitability. App. at 45-46.

In addition, the claims in the amended petition were supported by the affidavit of Gerard J. Girdaukas, Ph.D., a clinical psychologist. Dr. Girdaukas reviewed Mr. Evans' social history and administered a complete battery of intellectual, neuropsychological and personality tests. App. at 48-49.

The results of intelligence testing indicated that Mr. Evans is not psychotic or retarded but has significant and diffuse neurological impairments, probably chronic and longstanding. App. at 53-54. These neurological impairments are attributable to his chronic abuse of drugs and alcohol, together with the documented head trauma during his childhood. *Id.* They are indicated by Mr. Evans' long-term memory deficits, multiple incidents of head injury and trauma, his history of alcohol and drug abuse and his test results. *Id.*

Mr. Evans' performance on intelligence tests indicates that his ability to problem-solve by anticipating various alternatives and choosing the most appropriate is significantly impaired. His problem solving process can be characterized as an action-oriented one in which a course of conduct is chosen impulsively. App. at 54-55.

Overall, the test results indicated serious and significant impairments of Mr. Evans' brain functioning. An orbital frontal syndrome is possible. Damage to the frontal lobes impairs the ability to control impulses and increases the incidence of sexual and violent behaviors. App. at 56.

The impulse disorder from which Mr. Evans suffers, which was demonstrated in his aberrant sexual behavior, resulted from a combination of organic brain impairment, which reduces impulse control and inhibits the generation of appropriate responses to his feelings of depression and abandonment; his dysfunctional sexual history, marked by sexual abuse and exposure to inappropriate sexual behavior at a very early age; and the use of mind-altering drugs on the day of the offenses. These drugs, namely, PCP and alcohol, are well known for their powerfully disinhibiting effects, in particular sexual and aggressive impulses. App. at 58.

Both Ms. Messner-Peters and Dr. Girdaukas concluded that because of Mr. Evans' neurological impairments, his psychological and personality profile, his intellectual and emotional deficits, and his use of drugs and alcohol, on January 22, 1983, Mr. Evans was under the influence of extreme mental and emotional disturbance, and his capacity to conform his conduct to the requirements of the law was substantially impaired. App. at 57-58, 45-46.

Finally, Mr. Evans' claims were supported by the affidavit of Dr. Rosenwald. Specifically, Dr. Rosenwald stated:

> When I was asked my expert opinion as to whether Johnnie Lee Evans was acting under the influence of extreme mental or emotional disturbance when the murder was committed, I was unable to couch my opinion in the language referred to because I did not have a definition of the term extreme and it is not a term generally used in my field of expertise.
>
> If extreme mental or emotional disturbance is defined as less than insanity but more than the

> emotions of an average man, however inflamed, then I have no hesitancy in giving my expert opinion that Johnnie Lee Evans was acting under the influence of extreme mental or emotional disturbance when the murder was committed.
>
> If the term extreme is defined as very great, intense, or very severe, I have no hesitancy in giving my expert opinion that Johnnie Lee Evans was acting under the influence of extreme mental or emotional disturbance when the murder was committed.

App. at 63-64.

D. Proceedings on Mr. Evans' Petition for Post-Conviction Relief

On May 17, 1997, the circuit court dismissed Mr. Evans' petition in its entirety, without holding an evidentiary hearing. (R at E-4 - E-6; CR at C-186.) The court stated that Mr. Evans had failed "to raise any substantial violation of the constitution." (CR at C-194.) Specifically, the court found that, with respect to Mr. Evans' ineffective assistance of counsel claims, trial counsel had not been deficient (CR at C-190, C-191, C-193), and even if Mr. Evans had received deficient representation, he was not prejudiced by these errors. (CR at C-190, C-193).

Mr. Evans appealed the dismissal of his post-conviction petition to the Supreme Court of Illinois. On February 19, 1999, the Supreme Court of Illinois affirmed the circuit court's dismissal of Mr. Evans' petition, finding that the petition failed to allege either the performance or the prejudice prong of his ineffective assistance claims. Specifically, as to Mr. Evans' claim that he was denied effective assistance by counsel's failure to introduce evidence

that he was acting under extreme emotional or mental disturbance at the time of the offense, the Supreme Court of Illinois absolved counsel's inaction on the rationale that such evidence would have been inconsistent with Mr. Evans' testimony at the sentencing hearing, in which he denied involvement in the crime:

> Should trial counsel have presented a defense that contradicted defendant's protestations of innocence? Should counsel have labeled their client a liar so they could additionally label him a murderer who acted under an extreme emotional disturbance? Rather, closing argument reveals that trial counsel's sentencing strategy was to portray defendant as the neglected and unwanted victim of an abusive childhood, who raped women in a misguided quest for love.

App. at 11. The Supreme Court of Illinois also rejected Mr. Evans' claim that he was denied effective assistance by counsel's failure to introduce other mitigating evidence, concluding that such evidence would have been cumulative to the other mitigating evidence offered at sentencing. App. at 14-17.

On March 12, 1999, Mr. Evans filed a timely petition for rehearing, which the Supreme Court of Illinois denied on March 29, 1999. App. at 29.

ARGUMENT IN SUPPORT OF THE PETITION

The Counsel Clause of the Sixth Amendment mandates that in "all criminal prosecutions" the accused shall "have the assistance of counsel for his defense." U.S. Const. amend. VI. This constitutional guarantee does not require simply that a lawyer be present at trial alongside a defendant, but rather "the right to counsel is the right to ef-

fective assistance of counsel." *McMann v. Richardson*, 387 U.S. 759, 771 n.14 (1970).

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set forth a two-prong test for determining whether an attorney's performance at a capital sentencing hearing meets this constitutional requirement. First, a defendant must show that counsel's performance was "deficient." *Id.* at 687. Deficiency is demonstrated by error committed by counsel that falls below an objective standard of reasonableness. *Id.* at 688. Second, the defendant must show that counsel's performance prejudiced the defense. Prejudice is demonstrated where "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different" -- here, that the sentencer would have concluded that the balance of aggravating and mitigating factors did not warrant death. *Id.* at 694-95.

Numerous federal courts have determined that *Strickland* requires defense counsel to investigate and introduce mitigating evidence at the sentencing phase of a death penalty case. Specifically, courts have ruled that the failure to investigate and present a defense based upon the defendant's impaired mental capacity violates the *Strickland* standard outright, or at least warrants an evidentiary hearing. *See infra* at 22-23. As set forth more fully below, the Supreme Court of Illinois erred in its application of the *Strickland* standard to Mr. Evans' claims of ineffective assistance. This Court should grant a writ of certiorari to review and correct this error.

I. The Decision of the Supreme Court of Illinois on Mr. Evans' Claim of Ineffective Assistance Based on Counsel's Failure to Investigate and Introduce Available Evidence of Extreme Emotional or Mental Disturbance is Inconsistent with *Strickland* and Its Progeny

Under the Illinois death penalty statute, the sentencer is to consider "any aggravating and any mitigating factors which are relevant to the imposition of the death penalty." 720 ILCS 5/9-1(c). Further, the statute explicitly directs the sentencer to consider whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution. 720 ILCS 5/9-1(c)(2). Here, such evidence was available, but trial counsel failed to introduce it at the sentencing hearing. The Supreme Court of Illinois erred in affirming the dismissal of Mr. Evans' claim that he was denied effective assistance by counsel's failure to present such evidence.

A. Mr. Evans' Counsel Failed to Investigate and Introduce Available Evidence That Mr. Evans Was under the Influence of an Extreme Emotional or Mental Disturbance at the Time of the Offense

As detailed more fully above, defense counsel utterly failed to investigate and introduce the wealth of available evidence that Mr. Evans was under the influence of an extreme emotional or mental disturbance at the time of the offense. Had trial counsel performed competently, they would have presented such evidence at Mr. Evans' sentencing hearing.

The affidavits of Dr. Girdaukas and Ms. Messner-Peters establish that Mr. Evans was acting under the influ-

ence of extreme mental or emotional disturbance at the time of the Allen murder. Dr. Girdaukas, a clinical psychologist, conducted a battery of intellectual, neuropsychological and personality tests on Mr. Evans and reviewed his social history. App. at 53-54. Based on the test results and the social history, Dr. Girdaukas concluded:

> In my opinion, which I hold to a reasonable degree of certainty in my profession, the above-described neurological impairments, the psychological and personality profile, and the intellectual and emotional deficits existed on January 22, 1983. These conditions in combination with the ingestion of alcohol and drugs resulted in significant difficulties in cognition, that is, in the abilities to appreciate and understand fully the long term consequences of one's actions, to utilize appropriate judgment, and to control one's impulses. Mr. Evans reported that on the day of the offenses, his mother was very sick and there was no food in the house. Based upon the available data, including test results, interview data, the client's presentation and social history, *it is my opinion, which I hold with a reasonable degree of certainty in my profession, that at the time of the offense Mr. Evans was under extreme mental and emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired.*

App. at 57-58 (emphasis added).

Ms. Messner-Peters, a licensed clinical social worker, reached a similar conclusion. Based on her inves-

tigation into and evaluation of Mr. Evans' social history and background, she agreed with Dr. Girdaukas, concluding:

> In my professional opinion, which I hold to a reasonable degree of certainty in my profession . . . *Mr. Evans was under extreme mental and emotional disturbance at the time of the offenses*. The combination of Mr. Evans' drug and alcohol addiction and his entry into adulthood with extremely limited abilities renders his contacts with the criminal justice system almost an inevitability.

App. at 45-46 (emphasis added).

Finally, Dr. Rosenwald himself -- had he been properly advised and prepared by defense counsel -- would have testified that Mr. Evans was under the influence of an extreme emotional or mental disturbance at the time of the offense. App. at 63-64.

Trial counsel's failure to investigate, obtain and present evidence that Mr. Evans was under the influence of extreme mental or emotional disturbance at the time of the offenses falls below any standard of reasonableness. After asking for a continuance for exactly this purpose (TR at 2471), trial counsel did not ask Dr. Rosenwald to evaluate whether Mr. Evans was acting under extreme mental or emotional disturbance at the time of the offenses. Nor did they explain the meaning of this phrase or relevance of this issue to Dr. Rosenwald. Indeed, their lack of preparation on this issue is demonstrated by their failure to pose a proper question on this issue at the sentencing hearing. (TR at 2993.)

B. There is a Reasonable Probability that, but for Defense Counsel's Failure to Investigate and Introduce Available Evidence that Mr. Evans Was Under the Influence of Extreme Mental or Emotional Disturbance at the Time of the Offense, Mr. Evans Would Not Have Been Sentenced to Death

The trial court's comments in imposing the death penalty demonstrate the prejudice Mr. Evans suffered due to his counsel's deficiencies. In its analysis of mitigation, the trial court specifically found that Mr. Evans was not acting under the influence of extreme mental or emotional disturbance at the time of the offense. (TR at 3101-3102.) Unaware of the evidence supporting this mitigating factor, the trial court found that there were no mitigating circumstances sufficient to preclude the imposition of the death penalty. *Id.* The trial court then sentenced Mr. Evans to death. (TR at 3102, 3408.)

Further, in affirming Mr. Evans' conviction and sentences, the Supreme Court of Illinois found that Mr. Evans "presented no testimony whatever that he operated under an *extreme* mental or emotional disturbance *at the time of the offense*, as required by the statute." *Evans*, 125 Ill. 2d at 89, 530 N.E.2d at 1377 (emphasis in original). Accordingly, but for counsel's failure to investigate and introduce available evidence that Mr. Evans was under the influence of an extreme emotional or mental disturbance at the time of the offense, there is a reasonable probability that he would not have been sentenced to death.

C. The Supreme Court of Illinois Misapplied the *Strickland* Standard to Mr. Evans' Claim of Ineffective Assistance

The Supreme Court of Illinois affirmed the dismissal of Mr. Evans' claim of ineffective assistance by hypothesizing that trial counsel's failure to introduce evidence at sentencing that Mr. Evans was acting under an extreme emotional or mental disturbance at the time of the offense may have been the product of strategy. Specifically, the Court implied that trial counsel rejected the extreme mental or emotional disturbance theory after Mr. Evans, on cross examination, denied involvement in the murder. The Court stated:

> Should trial counsel have presented a defense that contradicted defendant's protestations of innocence? Should counsel have labeled their client a liar so they could additionally label him a murderer who acted under an extreme emotional disturbance? Rather, closing argument reveals that trial counsel's sentencing strategy was to portray defendant as the neglected and unwanted victim of an abusive childhood, who raped women in a misguided quest for love.[2]

App. at 11.

The hypothesis of the Supreme Court of Illinois -- that counsel's failure to investigate and introduce evidence of extreme emotional or mental disturbance may be attrib-

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[2] Such a sentencing strategy would have been both inconsistent with a protestation of innocence and insufficient to establish a statutory mitigating factor.

uted to strategy -- is belied by the record. During trial counsel's direct examination of Mr. Evans, she made no attempt whatsoever to elicit testimony that would support a theory of innocence or alibi. Nor did trial counsel call any other witnesses that would support such a theory. The very fact that trial counsel retained Dr. Rosenwald manifests their decision to present a theory of extreme emotional or mental disturbance, rather than to present a theory of innocence. If trial counsel had determined to present a defense of innocence or alibi, Dr. Rosenwald's testimony would have been wholly irrelevant to and inconsistent with that defense. Finally, trial counsel's closing argument -- after Mr. Evans had testified -- nowhere attempts to establish an innocence or alibi defense; rather, counsel argued that the "basic reason" why Mr. Evans should not receive the death sentence was because he was acting under an extreme emotional or mental disturbance at the time of the offense. (TR 3074.) These facts make clear that trial counsel did not elect to present a defense of innocence or alibi.

Moreover, the reasoning of the Supreme Court of Illinois ignored the well-established principle that counsel's failure to investigate and introduce available evidence of mental impairment at the sentencing stage of a capital case violates *Strickland*, or at least warrants an evidentiary hearing. *See Wallace v. Stewart*, No. 97-99016, 1999 WL 511348, at *3 (9th Cir. July 21, 1999) (remanding for evidentiary hearing on claim of ineffective assistance at capital sentencing; "[d]oes an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes."); *Caro v. Calderon*, 165 F.3d 1223, 1227-28 (9th Cir.) (same; counsel failed to introduce evidence that defendant had been exposed to neurotoxicants and suffered from diminished mental capacity),

cert. denied, 119 S. Ct. 2414 (1999); *Correll v. Stewart*, 137 F.3d 1404, 1414-15 (9th Cir.) (same; counsel failed to introduce evidence of defendant's mental health history and psychiatric condition at the time of the offense), *cert. denied*, 119 S. Ct. 450 (1998); *Hendricks v. Calderon*, 70 F.3d 1032, 1043-44 (9th Cir. 1995) (affirming grant of writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to introduce evidence of defendant's hard childhood and psychiatric and drug problems), *cert. denied*, 517 U.S. 1111 (1996); *Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995) (granting writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to introduce evidence of defendant's social history and organic brain damage), *cert. denied*, 519 U.S. 910 (1996); *Antwine v. Delo*, 54 F.3d 1357, 1367-68 (8th Cir. 1995) (same; counsel failed to introduce evidence that defendant suffered from bipolar disorder), *cert. denied*, 516 U.S. 1067 (1996); *Hill v. Lockhart*, 28 F.3d 832, 846-47 (8th Cir. 1994) (affirming grant of writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to introduce available evidence supporting statutory mitigating factor of extreme emotional or mental disturbance), *cert. denied*, 513 U.S. 1102 (1995); *Loyd v. Whitley*, 977 F.2d 149, 159-61 (5th Cir. 1992) (granting writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to investigate and introduce available evidence supporting statutory investigating factors of mental or emotional disturbance or mental disease or defect), *cert. denied*, 508 U.S. 911 (1993); *Brewer v. Aiken*, 935 F.2d 850, 858-59 (7th Cir. 1991) (affirming grant of writ of habeas corpus on claim of ineffective assistance at capital sentencing where counsel failed to investigate evidence of defendant's psychiatric history, which would have supported statutory mitigating factor of extreme mental or emotional disturbance).

Accordingly, the Supreme Court of Illinois erred in its application of *Strickland* to Mr. Evans' claim that he was denied effective assistance by counsel's failure to introduce evidence that he was acting under extreme emotional or mental disturbance at the time of the offense, and this Court should grant a writ of certiorari to review and correct this error.

II. The Decision of the Supreme Court of Illinois on Mr. Evans' Claim of Ineffective Assistance Based on Counsel's Failure to Investigate and Introduce Other Available Mitigating Evidence Is Inconsistent with *Strickland* and Its Progeny

The Illinois death penalty statute provides that, in deciding whether to impose the death penalty, the court "shall consider . . . any mitigating factors which are relevant to the imposition of the death penalty." 720 ILCS 5/9-1(c). Here, the only evidence presented by trial counsel in mitigation were the testimony of Dr. Rosenwald, discussed above, and the testimony of Mr. Evans himself. The Supreme Court of Illinois erred in affirming the dismissal of Mr. Evans' claim that he was denied effective assistance by counsel's failure to investigate and introduce other available mitigating evidence at his sentencing hearing.

Had trial counsel performed competently they would have obtained a social history containing the facts set forth in the affidavit of Arlene Messner-Peters, as well as the neorpsychological examination of Dr. Girdaukas. Adequate investigation into and presentation of this mitigating evidence would not have simply resulted in the presentation of the same information at the sentencing hearing. A thorough investigation has uncovered additional mitigation, such as the multiple incidents of head trauma, evidenced by scarring on Mr. Evans' head, the inappropriate sexual behavior in each of the households in which he was

raised and Mr. Evans' chronic abuse of alcohol and drugs. In addition, the affidavit of Ms. Messner-Peters not only sets forth Mr. Evans' life story, but, for the first time, explains how those experiences affected his development and, in her words, "render[ed] his contacts with the criminal justice system almost an inevitability." App. at 46. She explains that the chronic physical, sexual and emotional abuse which Mr. Evans suffered caused him to associate love with violence and to be unable to function under stress without aggression. She also explains that Mr. Evans' exposure to sexually abusive and inappropriate behavior resulted in his inability to establish appropriate sexual boundaries with people with whom he interacts. Similarly, Dr. Girdaukas' affidavit contains, for the first time, the results of comprehensive intellectual, neuropsychological and personality tests and, more importantly, diagnoses based on those results. Dr. Girdaukas explains that Mr. Evans suffers from an impulse disorder as a result of organic brain impairment, his dysfunctional sexual history, and his use of alcohol and drugs.

The Supreme Court of Illinois defended counsel's failure to investigate and introduce this plethora of mitigating evidence on the ground that the evidence was both "cumulative to defendant's extensive mitigation testimony" and "not inherently mitigating." App. at 16. Again, as with Mr. Evans' claim that he was denied effective assistance based on counsel's failure to introduce evidence of extreme emotional or mental disturbance, the Court's analysis of Mr. Evans' claim based on counsel's failure to introduce other mitigating evidence runs afoul of the *Strickland* standard, under which the failure to investigate and introduce such evidence warrants habeas relief or at least an evidentiary hearing. The cases are legion. *See Hall v. Washington*, 106 F.3d 742, 749-50 (7th Cir.) (granting writ of habeas corpus on claim of ineffective assistance at sentenc-

ing; "[t]his does not mean that only a scorch-the-earth strategy will suffice . . . [but] [w]here it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance"), *cert. denied*, 118 S. Ct. 264 (1997); *Clabourne v. Lewis*, 64 F.3d 1373, 1384-87 (9th Cir. 1995) (defendant was prejudiced by defense counsel's failure to prepare and present mitigating evidence of defendant's history of mental illness); *Antwine*, 54 F.3d at 1365-68 (death penalty vacated where counsel failed to more fully investigate his client's mental condition even though counsel obtained a court ordered mental examination of defendant by a state psychiatrist that indicated that defendant's odd behavior was due to drugs and not a mental disease or defect); *Baxter v. Thomas*, 45 F.3d 1501, 1512-15 (11th Cir.) (where counsel investigated defendant's background, but failed to take any steps to uncover mental health mitigating evidence that was readily available from school records and interviews of family and friends, counsel was ineffective and death penalty was reversed), *cert. denied*, 516 U.S. 946 (1995); *Parkus v. Delo*, 33 F.3d 933, 938-39 (8th Cir. 1994) (ineffective assistance claim stated where counsel performed inadequate investigation into petitioner's mental health history and a "reasonable probability exist[ed] that the jury, if given the opportunity to consider defendant's mental condition, would not have convicted him"); *Buenoano v. Singletary*, 963 F.2d 1433, 1437-38 (11th Cir. 1992) (allegations that counsel "failed to investigate, discover, and present mitigating evidence concerning [petitioner's] background and mental health" stated a claim for ineffective assistance); *Brewer*, 935 F.2d at 857 (defense counsel's failure to investigate defendant's mental history demonstrates conclusively that he did not "make a significant ef-

fort, based on reasonable investigation and logical argument," to present mitigation) (citation omitted); *Kenley v. Armontrout*, 937 F.2d 1298, 1304-09 (8th Cir. 1990) (death sentence vacated where counsel failed to investigate and present evidence of defendant's alcohol problems and personality disorder, even though the disorder "f[e]ll short of a mental defect or disease"), *cert. denied*, 502 U.S. 964 (1991); *Deutscher v. Whitley*, 884 F.2d 1152, 1159-61 (9th Cir. 1989) (where attorney knew that defendant "must have had some sort of mental problem," yet "completely failed to pursue the possibility of presenting mitigating evidence of mental impairment," decision not to investigate was not tactical and "counsel's performance was deficient"); *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir.) (counsel was deficient in failing to investigate mitigating evidence), *cert. denied*, 493 U.S. 874 (1989); *Evans v. Lewis*, 855 F.2d 631, 636 (9th Cir. 1988) (deficient performance where counsel knew his client had some sort of mental problems, but "conducted no investigation to ascertain the extent of any possible mental impairment"); *Stephens v. Kemp*, 846 F.2d 642, 652 (11th Cir.) (trial counsel's failure to "investigate, present and argue" evidence of defendant's mental history and condition "constituted error 'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment'") (citations omitted), *cert. denied*, 488 U.S. 872 (1988); *Middleton v. Dugger*, 849 F.2d 491, 493-95 (11th Cir. 1988) (attorney who failed to request psychiatric records that reflected defendant's troubled background and history of mental illness did not conduct a reasonable investigation and, thus, defendant was entitled to a new sentencing hearing).

CONCLUSION

Accordingly, the Supreme Court of Illinois misapplied the *Strickland* standard to Mr. Evans' claim of ineffective assistance based on counsel's failure to investigate and introduce other available mitigating evidence. This court should grant a writ of certiorari to review and correct this error.

Respectfully submitted,

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